INDEX.

PAGE

STATEMENT OF THE CASE 1

SPECIFICATION OF ERRORS 5

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. Both Pennsylvania and New York cannot levy inheritance tax on the property in question 9

II. The Pennsylvania tax here involved is a tax not on property but on succession by will or intestacy 11

III. The property in question passed to the legatees by virtue of the laws of New York and not of Pennsylvania 14

IV. The situs of Mr. Clarke's paintings for inheritance taxation was New York and not Pennsylvania 19

Recent decisions by this Court:

Frick *v.* Pennsylvania, 268 U. S. 473 19
Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204 21
First National Bank *v.* Maine, 284 U. S. 312 23
Blodgett *v.* Silberman, 277 U. S. 1 24
Johnson Oil Ref. Co. *v.* Oklahoma, 290 U. S. 158 25

Application of the tests suggested:

The paintings in question were not permanently located in Pennsylvania, nor were they kept and used there by the owner, nor habitually employed in Pennsylvania, nor did the inheritance tax in question have any real taxable relationship to the event which is the subject of the tax 26

Earlier decisions of this Court, involving property taxes:

Hays *v.* Steamship Co., 58 U. S. 596 28
Union Transit Co. *v.* Kentucky, 199 U. S. 194 29
Delaware, etc. R. R. Co. *v.* Pennsylvania, 198 U. S. 341 30

The analogy of the acquisition by persons of a new domicile 32

N. Y. Central R. R. *v.* Miller, 202 U. S. 584 ..... 32, 35

Application of the analogy as to the domicile of persons 36, 41

CONCLUSION 42

TABLE OF CASES, TEXT BOOKS AND STATUTES CITED.

PAGE

Barclay's Estate, 259 Pa. 401 40
Beaumont's Estate, 216 Pa. 350 15
Blackstone *v.* Miller, 188 U. S. 189 21
Blodgett *v.* Silberman, 277 U. S. 1 24
Burnet *v.* Brooks, 288 U. S. 378 11
Commonwealth *v.* American Dredging Co., 122 Pa. 386 29
Commonwealth *v.* Clyde Steamship Co., 268 Pa. 278 23
Com. *v.* Union Pac. R. Co., 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091 .. 23
Dammert *v.* Osborn, 140 N. Y. 30 15
Delaware, etc. R. R. Co. *v.* Pa., 198 U. S. 341 ..... 30, 33
Desmare *v.* U. S., 93 U. S. 605 40
Dupuy *v.* Wurtz, 53 N. Y. 556 40
Eidman *v.* Martinez, 184 U. S. 578 ..... 12, 16
Ennis *v.* Smith, 55 U. S. 400 40
Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204 ..... 9, 21
Farmers Loan & Tr. Co. *v.* U. S., 60 F. (2) 618 40
First Nat'l. Bank of Boston *v.* Maine, 284 U. S. 312 ..... 9, 14, 18, 23, 27
Frick *v.* Pa., 268 U. S. 473 ..... 9, 19
Gromer *v.* Standard Dredging Co., 224 U. S. 362 37
Guaranty Tr. Co. *v.* Com'r., 25 B. T. A. 507 40
Hays *v.* The Pacific Mail Steamship Co., 58 U. S. 596 28
Johnson Oil Ref. Co. *v.* Oklahoma, 290 U. S. 158 25
Jones *v.* Habersham, 107 U. S. 174 15
Keith *v.* Johnson, 271 U. S. 1 14
Kirkpatrick's Estate, 275 Pa. 271 13
Knowlton *v.* Moore, 178 U. S. 41 14
Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283 14
New York Central Railroad *v.* Miller, 202 U. S. 584 ..... 32, 35
Rogers *v.* Com'r., 17 B. T. A. 570 40
Selliger *v.* Kentucky, 213 U. S. 200 33
State *v.* Haight, 30 N. J. Law 428 33

Statutes:
- Act Pa. of June 7, 1917, P. L. 403 (20 P. S. 281) 15
- Act Pa. of June 20, 1919, P. L. 521 (72 P. S. Sec. 2301) 13, 22
- Act Pa. of July 9, 1919, P. L. 794 (72 P. S. Sec. 2483) 42
- Act Pa. of May 2, 1929, P. L. 1258 (72 P. S. Sec. 2306) 22

Sun Printing & Publishing Assn. *v.* Edwards, 194 U. S. 377 35

Text Books:
- American Law Institute's Restatement of Conflict of Laws, Section 22 .. 38
- American Law Institute's Restatement of Conflict of Laws, Section 328 .. 16
- Beale, The Situs of Things, 28 Yale Law Journal, 525 33
- Corpus Juris, Vol. 19 (Domicile) p. 408, Sec. 21 (d) 38

U. S. *v.* Knight, 291 F. 129 40
U. S. *v.* Perkins, 163 U. S. 625 14
Union Refrig. Transit Company *v.* Kentucky, 199 U. S. 194 29
Union Tr. Co. *v.* Com'r., 5 B. T. A. 1272 40
White, Matter of, 208 N. Y. 64 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 30.

City Bank Farmers Trust Company, Executor under the Will of Thomas B. Clarke, deceased, Appellant,

v.

William A. Schnader, Attorney General of the Commonwealth of Pennsylvania, and Leon D. Metzger, Secretary of Revenue of the Commonwealth of Pennsylvania.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPT. TERM, 1932, NO. 7395, OPINION MARCH 29, 1934 (R. 50).

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The essential facts, as averred in the Bill (R. 3-13) and in the Answer (R. 34-41) and in the Stipulation (R. 41-42) are as follows:

In March, 1928, Thomas B. Clarke, a citizen and resident of New York City, then in his 80th year, at the request of his intimate friend Dr. Fiske Kimball, Director of the Pennsylvania Museum, loaned to the Museum, for exhibition at the formal opening of the newly constructed Museum building on the Philadelphia Parkway, his unique collection of early American portraits.

The arrangement between Clarke and Kimball was wholly oral. No consideration was paid or intended to be paid to Clarke for the loan. It was understood that the pictures would be returned to Clarke at any time on his request.

On several occasions subsequent to the date of the original loan in March, 1928, Clarke suggested the return of the paintings, but under pressure from Kimball to extend his loan because of the great appreciation shown by the public, Clarke orally consented from time to time to leave the paintings temporarily at the Museum and thus when Clarke died on January 18, 1931, they were there on display, returnable on demand.

The 164 paintings comprising the loan had been collected by Clarke over a period of twenty or thirty years. 85 of them were owned by a New York corporation, The Art House, Inc., of which Clarke was the sole stockholder. Of the remaining 79 owned by Clarke personally, 5 were at the time of the loan in his New York residence, 10 were on exhibition at the Century Club in New York, and the balance, 64,

were in storage in New York City. All of the 79 owned by Clarke personally, which at the time of the loan had an unquestioned situs in New York City, had from time to time been exhibited there, in each case with selected groups of the 85 belonging to The Art House, Inc., but not as a unit or in connection with the entire 85.

In the spring of 1929, after the pictures had been at the Museum for about a year, Clarke, at Kimball's solicitation, wrote Kimball that if Kimball could secure a donor who would present the entire collection of 164 paintings to the Museum, Clarke would sell them as a whole to such donor at a stated price, it being then understood that Clarke would allow them to remain at the Museum for such reasonable time as Kimball might require to secure such donor. Subsequently, on May 21, 1930, Clarke again wrote Kimball stating that the above arrangement would terminate on June 17, 1930. From the latter date, at Kimball's solicitation, the pictures were permitted by Clarke to remain at the Museum, but with the understanding that they would be returned to Clarke in New York at any time on his request. During this time, Mr. Clarke, although not obligated to sell or otherwise to dispose of them, was willing (as the Answer avers) to sell the collection as a whole to any purchaser who would buy it for presentation to the Pennsylvania Museum or to a substantially similar institution.

When the pictures were sent to Pennsylvania, Clarke surrendered his lease for the storage space in

a New York warehouse where sixty-four of the pictures were at that time (R. 35). Thereafter, Clarke paid no rentals for storage space or any other storage charges on account of these pictures, nor did he reserve or control any storage space adequate for the storage of the pictures in New York from March, 1928, until the time of his death on January 18, 1931. Such storage space was, however, always readily obtainable during the entire period of the loan.

While the paintings thus remained at the Museum, Clarke made no definite plans or request for their return or removal to any other place, except that on April 29, 1929, four of them were sent at his request to the Virginia Historical Society, for an exhibition at Richmond, which four were returned to the Philadelphia Museum on May 25, 1929.

The Museum is a non-profit corporation partially supported by the City of Philadelphia and the Commonwealth of Pennsylvania and has secured a substantial portion of the works of art therein displayed to the public by voluntary loans from non-resident philanthropists, none of which were intended or regarded as permanent loans to the Museum. It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans.

Mr. Clarke's will was admitted to probate by the Surrogate Court of New York County, New York. It is not disputed that the paintings in question passed under his will as part of his residuary estate.

Following Clarke's death the controversy arose as to the power of the State of Pennsylvania to impose an inheritance tax on the 79 paintings belonging to the Estate of Mr. Clarke, the question being as to which of the two states, Pennsylvania or New York, was entitled to the tax. After some attempt by the Pennsylvania authorities to work out a reciprocity agreement with New York, complainant paid (under protest) the New York Estate Tax amounting to $69,500, on the basis of a return which included the paintings in question, and Mr. Schnader having advised, as Attorney General of Pennsylvania, that complainant's claim of non-taxability in Pennsylvania would be denied, complainant brought the present bill.

At the prior hearing, the District Court dismissed the bill on the ground that complainant had an adequate remedy at law. On appeal this Court reversed the judgment and remanded the case with instructions to reinstate the bill and proceed to a hearing upon the merits.

Thereupon, a final hearing was had upon the merits in the District Court and the bill dismissed by a divided Court. This appeal is taken from said decree of dismissal.

SPECIFICATION OF ERRORS.

I. The United States District Court for the Eastern District of Pennsylvania erred in denying the injunction prayed for by the complainant.

II. The United States District Court for the Eastern District of Pennsylvania erred in dismissing the Bill of Complaint on the merits.

III. The United States District Court for the Eastern District of Pennsylvania erred in imposing the costs of the above entitled proceedings in equity upon the plaintiff.

IV. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree:

> "And Now, to-wit, April 5th, 1934, the above cause, having been remanded to this Court by the order of the Supreme Court of the United States entered January 8, 1934, with instructions to reinstate the bill and proceed to a hearing upon the merits, came on to be heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged and decreed as follows:
>
> "I. That the Bill of Complaint be, and is hereby dismissed."

V. The United States District Court for the Eastern District of Pennsylvania erred in making the following finding, which, although designated a finding of fact, was in reality a conclusion from admitted facts, based on an erroneous understanding of the law:

> "(10) The 79 portraits in Pennsylvania at the time of Clarke's death had an actual situs in that State at that time."

VI. The United States District Court for the Eastern District of Pennsylvania erred in making the following conclusion of law:

> "The inheritance tax levied by the State of Pennsylvania upon the 79 portraits in the state at the time of Clarke's death was legally imposed."

SUMMARY OF ARGUMENT.

I. The transmission from the dead to the living of a particular thing is an event which can take place in and be made the basis of inheritance tax by but one state. The Constitution precludes the imposition of inheritance tax on these paintings by both New York and Pennsylvania.

II. The Pennsylvania tax here involved is a tax not on property but on succession by will or intestacy.

III. The personal property of Mr. Clarke, including the paintings in question, passed to the legatees named in his Will by virtue of the laws of New York and not of Pennsylvania.

Although the devolution of a decedent's real estate is governed by the law of the situs, in the case of personalty the law of the decedent's domicile is controlling.

IV. Under the decisions of this Court the situs of Mr. Clarke's paintings, for inheritance taxation, was New York and not Pennsylvania.

The recent decisions of this Court have progressively restricted the power of a State other than that of the decedent's domicile to impose inheritance tax on his personal estate.

Under all the tests suggested,—the permanent location in another state, the keeping and using of the property, or its habitual employment there,—the paintings here involved were subject to inheritance tax only by New York. Under the admitted allegations in the Bill, the loan to the Museum in Pennsylvania was but "temporary." The loan was successively renewed "on several occasions," each renewal starting the loan afresh. During the sojourn in Pennsylvania, the paintings were neither "kept" nor "used" by their owner, but by the Museum, for the benefit of the citizens of Pennsylvania. There was no employment at all of the paintings by their owner in Pennsylvania, much less a "habitual employment," nor did Pennsylvania occupy any "real taxable relationship" toward him or his estate.

Assuming that personalty may acquire a situs other than that of its owner, the test as to the acquisition of such new situs should be that established by the decisions as to the change of domicile of an individual, requiring not only removal to the new situs but also an intention that the new location be permanent. Such an intention cannot be predicated on a loan made for a special occasion and renewed "from time to time" "on several occasions," at the repeated solicitation of the borrower.

There is no suggestion in this case of a purpose or determination on Mr. Clarke's part that his paintings should remain permanently in Pennsylvania. Any such purpose is expressly negatived by the repeated requests for the renewal of the loan and by his failure to bequeath them to the Museum. His offer to sell them was not initiated by him but by the borrower, and came to nothing. The present proceedings are but a sorry recognition of his generosity to the people of Pennsylvania.

ARGUMENT.

I. The Transmission from the Dead to the Living of a Particular Thing is an Event which can Take Place in and be Made the Basis of Inheritance Tax by but one State. The Constitution Precludes the Imposition of Inheritance Tax on these Paintings by both New York and Pennsylvania.

Whatever may have been the law prior thereto, this Court, by its recent decisions has settled the constitutional principle under which but one State may impose inheritance taxes on the transmission, by a given decedent, of a specific item of property:

Frick v. *Pennsylvania, 268 U. S. 473;*
Farmers Loan & Trust Co. v. *Minnesota, 280 U. S. 204;*
First Nat'l Bank of Boston v. *Maine, 284 U. S. 312.*

In the case last cited the Court held that Maine could not constitutionally impose an inheritance tax

upon the estate of a Massachusetts decedent with reference to shares of stock in Maine corporations owned by the testator at the time of his death. In the course of its opinion the Court said (p. 326):

> "The rule of *immunity from taxation by more than one state,* deducible from the decisions in respect of these various and distinct kinds of property, *is broader than the applications thus far made of it.* In its application to death taxes, the rule rests for its justification upon the *fundamental conception* that *the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time.* In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local *situs* of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment,

within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which taxes place, and in the nature of things can take place, in one of the states only.

"A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states." (Italics ours.)

In the recent decision in *Burnet* v. *Brooks,* 288 U. S. 378, holding that the principle "thus progressively applied in limiting the jurisdiction of the States to tax, does not restrict the taxing power of the Federal Government" (p. 403) in reference to locally held securities of a non-resident alien, the Court stated that these decisions "established that proper regard for the relation of the States in our system required that the property under consideration (personalty) should be taxed in only one State and that jurisdiction to tax was restricted accordingly" (p. 401).

II. The Pennsylvania Tax here Involved is a Tax not on Property but on Succession by Will or Intestacy.

Much of the confusion of thought in cases of this kind arises, it is believed, from a failure to recog-

nize the distinction, so clearly pointed out by this Court in *Eidman* v. *Martinez,* 184 U. S. 578, 589, between taxes on property and those on the transfer of property at death, by will or intestacy—

> "The tax in question in this case not being upon the property itself, but upon the succession * * *, laws imposing general taxes upon real and personal property are not controlling when applied to taxes upon the succession, when such succession takes place and is governed by the laws of a foreign country. *The actual situs of the property in such cases cuts but a small figure,* while in the case of general taxes upon such property it is now considered determinative of the whole question." (Italics ours.)

That the majority of the Court below in the case at bar thus failed to recognize this difference between property taxes and inheritance taxes is apparent from the following passage in the opinion (Rec. 53):

> "The portraits were safely housed in Pennsylvania and were under the protection of the laws of that State. They had been taken out of storage to be placed where they were. They were there for an indefinitely prolonged stay and that, we think, gives them an actual situs."

The transfer which is taxed is an event "single in character" which takes place at a single moment of time. Hence the legal and factual status at the moment of death must be the basis for liability for tax. At the moment of Mr. Clarke's death the paintings were on temporary loan subject to be returned

on demand. Neither the length of time they had been in Pennsylvania nor the fact that they had been receiving protection have any bearing on the legal status at the moment of death. The facts in the above quoted statement from the opinion below might be important if the tax in question were a property tax but relate in no way to the privilege of transmission which is the thing taxed under the Pennsylvania law.

By the express terms of Section 1 of the Pennsylvania Act of June 20, 1919, P. L. 521 (72 P. S. §2301, quoted on p. 6 of the Record) the tax is imposed "upon the *transfer* of any property * * * when the transfer is by will or intestate laws." As the Supreme Court of Pennsylvania said in *Kirkpatrick's Estate,* 275 Pa. 271, 273:

> "* * * it is clear that the Act of 1919 did not impose a tax on property, but requires payment to be made from the estate of a decedent for the right of succession or the privilege of receiving at death the property possessed by a decedent. This right or privilege is purely a creature of statutory law. It did not exist at common law, and individuals possess no natural right to such succession; the sovereign authority that gives it may demand payment for the gift: Magoun *v.* Illinois Trust & Savings Bank, 170 U. S. 283, 290. 'The public contribution which death-duties exact is predicated on the passing of the property as the result of death as distinguished from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy.' "

In this respect the Pennsylvania statute is not unlike other inheritance tax laws, including that of New York.

Knowlton v. *Moore,* 178 U. S. 41;
U. S. v. *Perkins,* 163 U. S. 625;
Magoun v. *Illinois Tr. & Savings Bank,* 170 U. S. 283;
Keith v. *Johnson,* 271 U. S. 1;
Matter of White, 208 N. Y. 64, 67.

III. The Personal Property of Mr. Clarke, Including the Paintings in Question, Passed to the Legatees Named in his Will by Virtue of the Laws of New York and not of Pennsylvania.

"A transfer from the dead to the living * * * is effected under the laws, and occurs within the limits, of a particular State. * * * Death duties rest upon the power of the State imposing them to control the privilege of succession." To enable a State to impose such a tax there must be on the part of the State a "real taxable relationship to the event which is the subject of the tax."

First National Bank of Boston v. *Maine,* 284 U. S. 312, 327, 329.

Pennsylvania had no taxable relationship to the transfers made by the Clarke will. These transfers did not depend for their validity upon the law of Pennsylvania nor had Pennsylvania the right to control the privilege of succession in respect to such personal property belonging to Mr. Clarke.

The will was admitted to probate in New York, the State of Mr. Clarke's domicile. It derived all its authenticity as a will and all its capacity to transmit property, from the judicial proceeding in New York. Pennsylvania added nothing to the validity of the will or probate. Section 24 of the Wills Act of Pennsylvania, Act of June 7, 1917, P. L. 403, 412 (20 P. S. 281), provides as follows:

> "Nothing in this act contained shall be construed to apply to the disposition of personal estate by a testator whose domicile at the time of his death was out of this Commonwealth."

See also *Beaumont's Estate,* 216 Pa. 350, 354.

The validity of all dispositions made by the will of personal property, tangible or intangible, is governed by the law of New York, the domicile. "That law is part of the disposition and the foundation of all title under it." (*Dammert* v. *Osborn*, 140 N. Y. 30, 39.)

> "According to the uniform course of the decisions of this court, the validity of these devises, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of the bequests, as against the next of kin, upon the law of the State in which the testatrix had her domicile. *Vidal* v. *Girard,* 2 How. 127; *Wheeler* v. *Smith,* 9 id. 55; *McDonogh* v. *Murdock,* 15 id. 367; *Fontain* v. *Ravenel,* 17 id. 369, 384, 394; *Perin* v. *Carey,* 24 id. 465; *Lorings* v. *Marsh,* 6 Wall. 337; *United States* v. *Fox,* 94 U. S. 315; *Kain* v. *Gibboney,* 101 id. 362; *Russell* v. *Allen, ante,* p. 163."
>
> *Jones* v. *Habersham,* 107 U. S. 174, 179.

Section 328 of the American Law Institute's Restatement of Conflict of Laws, with the pertinent comments, is as follows:

> "SECTION 328. The validity and effect of a will of movables are determined by the law of the state in which the deceased died domiciled."
>
> "*Comment:*
>
> (*a*) The law of the state of the domicil of a testator determines his capacity to make a will, the form of the will, the validity of a particular provision in the will, the nature of the estate created, and the capacity of a legatee to take his legacy. In case of a legacy to a corporation, the state of domicil of the deceased determines its capacity to take the legacy in accordance with the law of the state of incorporation."
>
> * * * * * * *
>
> "(*d*) In case a will disposes of both land and movables, the validity of devises of land is governed by the law of the state of situs of the land devised; the validity of bequests of movables is governed by the law of the state in which the testator died domiciled."

In *Eidman* v. *Martinez,* above cited, the question was whether the corporate bonds of a Spanish decedent, held by a New York agent, were subject to the Federal inheritance tax act of 1898 imposed upon the transfer of "property, either by will or by the intestate laws of any State or Territory." This Court held that the property passed by the law of Spain rather than by the law of New York and therefore did not pass, according to the terms of the statute, under the laws "of any state or territory." The

argument was urged upon this Court that the property actually passed under the laws of New York which adopted by comity as its own law, the succession laws of Spain. This Court answered that argument as follows (184 U. S. p. 591-2):

> "To say that we recognize by comity the law of a foreign domicil as controlling the transmission or succession of personal property because it thereby becomes *our* law, (and the property therefore taxable,) as is indicated in some cases, notably in *Alvany* v. *Powell,* 2 Jones Eq. 51, is misleading and little more than a play upon words. When we speak of *our* laws we mean to be understood as referring to our own statutory laws or the common law we inherited from the mother country, and when we apply the laws of a foreign domicil we do so, not because they are our laws, but because upon principles of comity we recognize those laws as applicable to the particular case. But to speak of such foreign laws as thereby becoming 'the intestate laws of any State or Territory,' wherein they are enforced, is practically to confound the whole distinction between the law of the *situs* and the law of the domicil. We do not enforce the law of Spain in this case because it is our law, but because the practice of all civilized nations is to recognize the law of the domicil as governing the transmission and inheritance of personal property, and to prevent the confusion that would follow, if estates, situated possibly in half a dozen countries, were administered and distributed according to the laws of each country in which any portion of such estate happened

> to be located. We decline to hold the tax involved in this case applicable to this estate because the words of the statute do not require it, and because the thing taxed, that is, the transmission of the property to the legatees or next of kin, takes place in a foreign country."

Pennsylvania's relation to the transfer of Mr. Clarke's personal property under his will was entirely passive. Ancillary administration was not actually raised in Pennsylvania and, even if it could have been insisted upon for the benefit of local creditors, was no more than could be required had the property in question remained in Pennsylvania for but a single day, or had the *res* been stock of a Pennsylvania corporation, which under the decisions would clearly have not been subject to inheritance tax, in spite of the fact that in the case of stock something would have to be done in Pennsylvania, subject to Pennsylvania law, to complete the transfer.

> *First National Bank of Boston* v. *Maine,* 284 U. S. 312.

The devolution by will or by intestacy of real property has, on the contrary, always been governed not by the law of the owner's domicile, but by that of the situs of the property. The State, being vitally interested, as a matter of essential public policy, in the personnel of the owners of its soil, has consistently refused to recognize any law other than its own as governing the right to transmit real property, and this Court has recognized this in sustaining the

right of the State of the situs of realty to impose inheritance tax on the real estate of a foreign decedent and in denying that right to the State of the owner's domicile.

IV. Under the Decisions of this Court the Situs of Mr. Clarke's Paintings, for Inheritance Taxation, was New York and not Pennsylvania.

Admittedly, Mr. Clarke's residence and domicile, at the time of his death and for years prior thereto, was New York. Admittedly, also, the situs or domicile of the paintings, prior to their loan to the Pennsylvania Museum, was New York and had been for the twenty or thirty years during which Mr. Clarke had collected them.

While none of the prior decisions of this Court is precisely on all fours with the facts here presented, the principles enunciated in them fully support, it is submitted, the position of appellant,—that the seventy-nine paintings temporarily loaned by Clarke to the Pennsylvania Museum had, at his death, no legal situs in Pennsylvania sufficient to warrant the exaction by Pennsylvania of an inheritance tax on their transfer from a New York decedent to his New York legatees.

We will first consider the three recent decisions cited under our First Point (*supra,* p. 9).

Frick v. *Pennsylvania, 268 U. S. 473,* presented a case converse to that at bar. There Frick, a resi-

dent of Pennsylvania, had a collection of rare paintings and works of art permanently housed in a building in New York City especially constructed for that purpose and known as "The Frick Collection." He also had certain paintings, objects of art, furniture, etc., at his summer home in Massachusetts. Pennsylvania claimed a right to impose an inheritance tax upon these items of tangible personal property, but the Court held that such a tax could not be imposed under the Fourteenth Amendment because the property had an "actual situs" in New York and in Massachusetts respectively, saying (p. 496):

> "* * * that the Pennsylvania statute, in so far as it attempts to tax the transfer of tangible personalty having an *actual situs* in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid." (Italics ours.)

The decision clearly pointed out that an inheritance tax on such items could be imposed only by the State where they had an actual situs. The Court did not, however, there define what it meant by "actual situs" because the situation was clear in that respect. The Frick property held taxable outside of Pennsylvania consisted of the Frick Collection of paintings, housed permanently in a special building in New York City and bequeathed by Frick to New York, and of furniture in his New York residence and in his summer home in Massachusetts, in each case a part of his permanent establishments in those localities. New

York was the permanent address of the Frick Collection, as well as of his furnished New York residence. Massachusetts was the permanent address of his furnished summer home at Pride's Crossing, as well as of the furniture necessary to make it a home.

> "This property," the Court said, "by reason of its character and situs, was wholly under the jurisdiction of those States, and in no way under the jurisdiction of Pennsylvania. * * * In these respects the situation was the same as if the property had been immovable realty" (p. 492).

In each case the personalty was an essential part of the establishment, which, like real estate, was beyond the taxing power of Pennsylvania.

New York and Massachusetts were, furthermore, the respective States where, in the language of the later Maine case, the property was *"kept and used."*

In *Farmers Loan & Trust Company* v. *Minnesota, 280 U. S. 204,* this Court, expressly overruling *Blackstone* v. *Miller, 188 U. S. 189,* held that bonds were subject to inheritance tax only by the State of the domicile. Referring to the Frick case which sanctioned the taxation by States other than Pennsylvania of Frick's stock in foreign corporations, the Court said (p. 210):

> "At this time it cannot be assumed that tangible chattels *permanently* located within another State may be treated as part of the universal succession

> and taken into account when estimating the succession tax laid at the decedent's domicile." (Italics ours.)

By the above-quoted statement the Court made it clear that tangible chattels can in no event have a situs for taxation in a State other than that of the decedent's domicile unless they are "permanently located" in such new State.

It is believed that this is also the proper construction of the Pennsylvania inheritance tax statute (Act of June 20, 1919, P. L. 521; 72 P. S. sec. 2301) which imposes a tax upon the transfer of any property, real or personal, owned by a non-resident decedent:

> "(b) When the transfer is by will or intestate laws of real property within this Commonwealth, or of goods, wares, or merchandise within this Commonwealth, * * *."

While the statute literally imposes an inheritance tax upon a non-resident's chattels "within this Commonwealth," this language must be read in connection with the later Act of May 2, 1929, P. L. 1258 (72 P. S. sec. 2306), creating a reciprocal exemption from inheritance taxation on all personal property of non-residents "except tangible personal property having an *actual situs* in this Commonwealth." The Legislature of Pennsylvania thus construed the phrase "within this Commonwealth" in the original statute to mean having a taxable situs therein as defined by the decisions of this Court. This would seem to follow from the following statement of the Supreme

Court of Pennsylvania in *Commonwealth* v. *Clyde Steamship Co., 268 Pa. 278, 281:*

> "It is hardly necessary to say that the taxable situs of tangible personal property, not *permanently* nor *continuously* nor *habitually* but only *temporarily* in a state is the domicile of the owner." (Italics ours.)

In *First National Bank* v. *Maine, 284 U. S. 312,* heretofore referred to, the Court, in discussing the relative merits of two contending states to impose inheritance tax on a specific item of personal property, lays down as the test of actual situs the place where the property is *"kept and used"* (page 329):

> "This ancient maxim (*mobilia sequuntur personam*) had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him on his journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded *to the law of the place where the property is kept and used."** (Italics ours.)

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* An interesting although of course not here authoritative application of this idea, with especial reference to the accommodation loan feature of the case at bar, is found in *Com.* v. *Union Pac. R. Co.,* 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091. There the Railroad, a non-resident, permitted its freight cars to be used by local railroads at a nominal per diem rental (which

And in the next paragraph the Court links up the right to tax with a *"real taxable relationship"* to the power of the state to control the privilege of succession (p. 329):

> "And since death duties rest upon the power of the state imposing them to control the privilege of succession, the reasons which sanction the selection of the domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, *any real taxable relationship to the event which is the subject of the tax.*" (Italics ours.)

The majority of the lower Court in the case at bar placed considerable reliance on *Blodgett* v. *Silberman, 277 U. S. 1,* where this Court (prior to the decision in First National Bank *v.* Maine) held that $287.48 of coin and bank notes, kept by a Connecticut decedent in a safe deposit box in New York City (where the decedent was active in business as a partner in a brokerage firm), might not be subjected to inheritance tax by Connecticut. It did not there appear that the

allowed no profit) to facilitate through routing of freight. The Court refused to allow the Commonwealth to tax the average number of cars in the state because the owner did not *use* the cars in the state *for profit,* but in effect loaned them temporarily to local lines for the convenience of the latter. "In no just or exact sense," said the Court, "* * * can it be said that the foreign railroads either send, use, or employ any portion of their freight cars in this state. * * * As truly said by Justice Holmes in *N. Y.* v. *Miller,* 202 U. S. 584, these foreign freight cars come into this state on 'random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of *other* roads.' *No business, no purpose of the owning road, is served by their presence here.* * * * We have then only chattels temporarily present within the state, which such chattels this state may not tax." (Italics ours.)

coin and bank notes had ever been in Connecticut or that they were ever to be taken or kept or used by the decedent there. From the fact that they were kept in the safe deposit box in New York, it would appear that they were for use in connection with the decedent's New York business. This Court considered that this cash had been "so definitely fixed and separated in its actual *situs* from the person of the owner" that it belonged permanently in New York, as did the paintings and furniture in the Frick case.

The above case is obviously no authority for the position that pictures, originally located permanently in New York, lost their New York domicile and acquired a taxable situs in Pennsylvania merely by reason of a temporary sojourn in Pennsylvania at the request of the people of Pennsylvania, for mere temporary display and not part of a permanent exhibition.

In *Johnson Oil Ref. Co.* v. *Oklahoma, 290 U. S. 158,* the question was as to the power of Oklahoma to levy a property tax on the entire fleet of oil tank cars owned by an Illinois corporation whose refinery was located in Oklahoma, where, although all the cars were in Oklahoma for part of every year, but a small proportion were there at any time. The Court, reversing the State Court, held that the State could exact the tax only on its "proper share" of the entire fleet, measured by the average number of cars present in Oklahoma at a given time. The Court stated the basis for jurisdiction, even as to property taxes, to be

the *habitual employment* of the property within the State (pp. 161-162):

> "* * * While, in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this description *must be determined on a basis which is consistent with the like jurisdiction of other States.*
>
> "The basis of the jurisdiction is the *habitual employment* of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars is *habitually employed* in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. * * *" (Italics ours.)

Assuming that, since the decision in the Maine case, tangible personalty not part of an established local business or, as in the Frick case, intimately connected with real estate, can acquire a situs away from the owner's domicile sufficient to support inheritance taxation by the State of the situs, still the Clarke pictures would fall far short either of the test of "the *habitual employment* of the property within the State" in the foreign State, or that of the place where the property was "*kept* and *used.*" Certainly one

who, at the request of the officers of a public museum of a neighboring State, loans his pictures to such museum for a special occasion, and merely allows them to remain, subject to recall at any time, by the exercise of renewed courtesy on repeated applications for an extension of the loan, cannot be said to have "habitually employed" his property within the borrowing State. Nor can they be said to have been "kept and used" by Clarke in Pennsylvania, since the pictures were, during their sojourn to Pennsylvania, kept by the Museum, and used solely by it for the benefit of the citizens of Pennsylvania.

In the *Maine* case the Court had already pointed out (284 U. S. at p. 330) that its decisions, confining the power to levy inheritance taxes to one State on each specific item of property, did not preclude the State of Maine from properly exacting a transfer tax on the transfer of the stock of a Maine corporation though owned by a non-resident, the liability for the tax being based on the transfer of the shares in Maine, irrespective of whether the occasion thereof was the sale or gift by the holder or his death. Similarly, under the above decisions, Pennsylvania might conceivably have exacted an annual property tax on the pictures for the time during which they were physically located in the Pennsylvania Museum, irrespective of the permanency of their situs there, the tax being based on the temporary protection accorded them under Pennsylvania law. In each of

these cases the tax would have a "real taxable relationship to the event which is the subject of the tax." Clearly, however, there is no such relationship incident to the fact that Mr. Clarke happened to die before he got his pictures back home again.

In determining whether or not situs in Pennsylvania was temporary or permanent, reference may be had to some of the earlier decisions dealing with property taxation.

In *Hays* v. *The Pacific Mail Steamship Co., 58 U. S. 596,* the taxpayer, a New York corporation engaged in the shipping business, complained of the assessment and collection of property taxes in California upon its ships that put into California ports. The Court upheld the taxpayer, saying (p. 599):

> "She is within the jurisdiction * * * *temporarily,* and for a purpose wholly excluding the idea of *permanently* abiding in the State, or changing her home port."
>
> * * * * * * *
>
> "We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the State; they were there but *temporarily,* engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid." (Italics ours.)

In *Union Refrig. Transit Company* v. *Kentucky, 199 U. S. 194,* the Court held that a Kentucky corporation could not be subjected to property taxation in Kentucky with reference to refrigerator cars permanently employed without the State. In the course of the opinion the Court uses the word "permanently" ten different times, laying emphasis upon the permanence of the location of the property outside of Kentucky and, distinguishing the case of *Commonwealth* v. *American Dredging Co., 122 Pa. 386,* which it apparently approved, upon this basis (p. 208):

> "In *Commonwealth* v. *American Dredging Company,* 122 Penna. St. 386, it was held that a Pennsylvania corporation was taxable in respect to certain dredges and other similar vessels which were built, but not permanently retained outside of the State. It was said that the non-taxability of tangible personal property located permanently outside of the State was not 'because of the technical principle that the *situs* of personal property is where the domicil of the owner is found. This rule is doubtless true as to intangible property such as bonds, mortgages and other evidences of debt. But the better opinion seems to be that it does not hold in the case of visible tangible personal property *permanently* located in another State. In such cases it is taxable within the jurisdiction where found and is exempt at the domicil of the owner.' *The property in that case, however, was held not to be permanently outside of the State, and therefore not exempt from taxation.*" (Italics ours.)

In *Delaware, etc. R. R. Co.* v. *Pa., 198 U. S. 341,* the Court was considering the capital stock tax upon a Pennsylvania corporation with reference to coal that had been sent out of the state for sale. It was held that the tax was essentially a property tax upon the coal. The Pennsylvania Supreme Court held that the coal was only temporarily located outside the state and, therefore, could be taxed by Pennsylvania. This Court held, however, that the coal had been sent out of Pennsylvania never to return and, therefore, could not be taxed in Pennsylvania. The Court distinguished the American Dredging Company case on this ground, saying (p. 356):

> "The asserted transitory nature of this property does not seem to us to be material. At the time of the appraisement it had been transported beyond the jurisdiction of the State, *never to return in kind,* but was intended to be sold in the foreign State. Such property is entirely unlike the property involved in *Commonwealth* v. *American Dredging Co., 122 Pa. St. 386.* That property consisted of vessels, or scows, or tugs, only *temporarily* out of the State of Pennsylvania, for the purpose of engaging in business, and liable to return to the State at any time, and was without any *actual situs* beyond the jurisdiction of the State itself. However temporary the stay of the coal might be in the particular foreign States where it was resting at the time of the appraisement, it was *definitely* and *forever* beyond the jurisdiction of Pennsylvania."

* * * * * * *

> "* * * the coal had lost *its situs* in Pennsylvania by being transported from that State to foreign States for the purposes of sale, *with no intention* that it should ever return to its State of origin." (P. 360.) (Italics ours.)

While in that case the Court referred to the fact that the coal had been shipped out of Pennsylvania for sale, the importance of this was merely to support the fundamental conclusion that the coal had permanently left Pennsylvania, *"never to return."* In the case at bar, it is not contended that the Clarke pictures were sent out of New York for the purpose of selling them. The idea of a sale did not occur either to the testator or to Mr. Kimball until the spring of 1929, a year after the original loan. While, at Mr. Kimball's request, Mr. Clarke then expressed his willingness to sell the collection, this came to nothing, since Mr. Kimball was unable to find a donor able and willing to undertake the proposed gift. The essential point in the coal case was that the coal had been sent out of Pennsylvania "with no intention that it should ever return" and, therefore, Pennsylvania had lost its right to impose a property tax thereon. In the case at bar Mr. Clarke sent the pictures to Pennsylvania for the purpose of a temporary loan and with the perfectly definite and clear intention that they should be returned to him in New York City.

From the foregoing decisions it is clear that, even in cases involving property taxes, a state other than

that of the owner's domicile can constitutionally levy the tax only on property *permanently* located within its borders and is powerless to tax personalty which the owner has taken or sent there but temporarily and with the intention of bringing it back home when the object for which it has been sent to the other State has been occomplished. *A fortiori* such other state is powerless to impose an *inheritance* tax on such property merely because its owner happens to die during the interim.

As acquired in New York by Mr. Clarke over the thirty year period, the 79 paintings had, admittedly, an actual situs in the State of New York for purposes of taxation. Even if this were a case involving a property tax, the burden would clearly be on defendants to establish that the original loan, with its several renewals, to the Pennsylvania Art Museum, not only created a new "actual situs" in Pennsylvania but deprived the pictures of their original "actual situs" in New York State. The presumption would be against such a change in situs, on the analogy of those cases which hold that an original domicile is not lost until a new legal residence is clearly acquired.

This reasoning was voiced by this Court in *New York Central Railroad* v. *Miller, 202 U. S. 584.* In that case the State of New York was attempting to impose a franchise tax—admitted to be a direct property tax—upon cars belonging to a New York corporation which were at times temporarily ab-

sent from the State. The railroad contended that a considerable proportion of its cars were constantly out of the State and that such a proportion should be deducted from the taxable value of its capital stock. The Court rejected this argument and said (p. 596):

> "Suppose, then, that the State of New York had taxed the property directly, there was nothing to hinder its taxing the whole of it. It is true that it has been decided that property, even of a domestic corporation, cannot be taxed if it is permanently out of the State. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 201, 211; *Delaware, Lackawanna & Western R. R.* v. *Pennsylvania*, 198 U. S. 341; *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385. But it has not been decided, and it could not be decided, that a State may not tax its own corporations for all their property within the State during the tax year, even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back. Using the language of domicil,* which now so frequently is applied to inanimate things, the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts. *Ayer & Lord Tie Co.* v. *Kentucky*, May 21, 1906, *ante*, p. 409. See also *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 208, 209."

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* The similarity between the conception of domicil and that of situs of property has often been noticed. Beale, *The Situs of Things*, 28 Yale Law Journal 525. In *Selliger* v. *Kentucky*, 213 U. S. 200, 207, this Court spoke of the goods in question as "still domiciled in Kentucky." In the *Delaware, L. and W. R. R. Co.* v. *Pa. case*, 198 U. S. 341, 355, this Court spoke of coal not having "lost its original domicil." In *State* v. *Haight*, 30 N. J. Law 428, 430, the court speaks of chattels having their "home" or "place of residence" in another state.

As heretofore stated, we submit that under the later decisions by this Court, cases involving inheritance taxes are governed by different principles from those involving property taxes, and that inheritance taxes may constitutionally be exacted by a State other than that of the testator's domicile only when the tax is on the transfer of realty within the borders of the taxing State, the devolution of which its public policy requires to be governed by its own laws, or in the case of tangible personal property having a permanent situs therein for business purposes (governed by a similar principle of public policy) or tangible personal property so annexed to or associated with real estate as to be for practical purposes a part of the realty. If such be now the law, the permanent or temporary character of the presence of tangible personal property away from the decedent's domicil, has become immaterial, the sole question being whether it is part of the assets of a business in the taxing state or connected with local real estate. Such a rule is simple, easily understood, avoids the necessity of determining what was in the mind of the decedent, and avoids the continual disputes between the several States as to which is entitled to the tax on personalty which happens to be away from home at the time of the decedent's death.

If, however, the Court should deem it wise still to apply to inheritance tax cases the same principle applicable in property tax cases and make the test that of permanent or temporary location, it would seem

that the last sentence in the case of *New York Central Railroad* v. *Miller* above quoted (p. 33) furnishes a persuasive analogy. In a long line of decisions, in England and in this country, the Courts have developed the law of domicile and have settled the principles and tests to be applied in determining when the domicile of a person, originally in one jurisdiction, is held to be transferred to another.

There would seem to be no reason why, with the common law thus satisfactorily settled and understood as to the determination of the domicile of persons, the Court should be asked to lay down entirely new principles for the determination of the taxable "domicile" of personal property, particularly in view of the Court's clear statement, above quoted, that the rules determining the domicile of persons are to be "applied to inanimate things." If we thus follow the analogy of loss and acquisition of domicile, treating the pictures as original residents of New York who, it is contended, acquired a new domicile in Pennsylvania, the solution is simple.

> "* * * it is elementary that, to effect a change of one's legal domicil, two things are indispensable: First, residence in a new domicil; and, second, the intention to remain there. The change cannot be made, except *facto et animo.* Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. *Mitchell* v. *United States,* 21 Wall. 350."
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> *Sun Printing & Publishing Assn.* v. *Edwards,* 194 U. S. 377, 383.

Let us assume, for the purposes of the analogy, that instead of 79 paintings the case involved 79 painters, residents of New York in Mr. Clarke's employ, whom, at Mr. Kimball's request, he loaned to the Museum to paint the new building. Suppose further that, when the painting of the new building was completed, Kimball was so pleased with their work that, in spite of Clarke's suggestion that the painters come back home, he successfully pressed Clarke to let them stay on in Philadelphia to paint other buildings. Transferring into terms of domicile the contentions stressed by the other side in the present case, let us assume that certain of the workmen, when they came to Philadelphia, gave up their rooms in their New York boarding houses and paid no board there during their residence in Philadelphia. Also, that after their arrival in Philadelphia Kimball inquired of some of them (with Clarke's permission) as to whether, if he could secure them permanent jobs in Philadelphia, they would accept such jobs and make Philadelphia their permanent homes, and that these workmen had indicated that they would be willing to do so, but that no definite offer of a permanent job had ever been forthcoming.

Certainly under the above circumstances it could not be successfully contended that any of the workmen had lost their New York domiciles or acquired domiciles in Philadelphia. Certainly all of them would continue to vote and to pay income and personal property taxes in New York, and if any of

them had died on the Museum site his estate would have been administered in New York.

In the case at bar, the 79 paintings, from the moment that they left New York to the time of Mr. Clarke's death had, as it were, return tickets to New York, since both at the time of the original loan and also at the moment preceding Clarke's death it was understood that they would be returned to him at any time on his request, the word "return," of course, implying the return to the place of origin,—New York.

It is respectfully submitted that when the majority of the Court below stated that the analogy of domicile of persons as applied to the taxation of personal property "was urged by the minority and rejected [by the majority of this Court] in *Gromer* v. *Standard Dredging Company*," 224 U. S. 362, the lower Court wholly misunderstood that decision. The majority opinion in that case (which involved a property and not an inheritance tax) is clearly based on the assumption that, under the pleadings, the situs of the property taxed was admitted to be within Porto Rico, which sought to tax it, and therefore not before the Court for decision. The minority differed as to this, holding that the question of taxable situs was presented by the Record and that such situs was not in Porto Rico since the articles taxed were there for but a temporary purpose. But for the fact that the majority considered that the question of situs was settled in favor of Porto Rico by the admission

in the record, the decision of the entire Court would, it is submitted, have been that the tax was not lawfully imposed.

The decisions on domicile clearly hold that for the acquisition of a new domicile the intention must be to make the proposed new domicile a home at the moment and not in the future, and further, that the intention must be an absolute one and not conditional on the happening of a future event.

Section 22 of the tentative draft of the American Law Institute *Restatement of the Conflict of Laws,* with subdivision (b) of the comments and the third illustration, are as follows:

> "SECTION 22. PRESENT INTENTION.
>
> "For the acquisition of a domicil of choice the intention to make a home must be an intention to make a home at the moment, not to make a home in the future.
>
> *"Comments:*
>
> "b. The intention to make a home must be an absolute one, not conditional on the happening of a future event.
>
> *"Illustration:*
>
> "3. A goes to X intending to stay there only if he passes a certain examination, or if he can get work. A is not domiciled in X until the condition is fulfilled."

Vol. 19 of *Corpus Juris* (Domicile), p. 408, Section 21 (d), states the law relative to contingent intention to acquire domicile as follows:

"Contingent intention.—Since the intention must be present and fixed, and not ultimate, a domicile is not changed by removing therefrom and locating in a new place, with an intention to make the latter a permanent home at some future time, or upon the happening of some future and contingent event."

Footnote 14, in support of the above statement of the law, is as follows:

"(*a*) Seeking employment.—(1) Where a person removes to another state with his wife to seek employment, but fails to find work and returns alone, he does not acquire a domicile, since his intention to acquire one depended upon a contingency that never happened. Ross *v.* Ross, 103 Mass. 575. (2) Where a resident of Kansas went to Colorado, intending if successful in obtaining a situation in the public schools to remain there, and if not to return to Kansas, but was seriously injured before the result of the civil service examination which she had taken was known and thereupon went back to Kansas where she has since remained, it was held that at no time did she cease to be a resident of Kansas. Denver *v.* Sherret, 88 Fed. 226, 31 CCA 499.

"(*b*) Contingent intention to abandon.—A person having a fixed domicile and having quitted it with the proposed intention of returning, which intention may be annulled by the happening of a particular event, cannot by law be said to have abandoned his domicile. Craigie *v.* Lewin, 3 Curt. Eccl. 435."

Applying further the analogy of domicile, the length of time that the pictures were actually in Pennsylvania is material only as one factor evidencing the intention of the owner to give them a permanent situs. Where, as in the present case, the loan was admittedly temporary at its inception and was so continued by successive specified renewals, the important point is not how many months or days or years the pictures were actually in Pennsylvania, but what was their status at the moment of Mr. Clarke's death. Admittedly, on the day that Mr. Clarke died the pictures were at the Pennsylvania Museum on a loan terminable by him at any moment and under an agreement by which, at his request at any time, Kimball was bound to pack up the paintings and ship them back to New York. Any tentative and contingent arrangement for the sale of the pictures to a proposed donor had been terminated by Mr. Clarke eight months before his death, on which termination they reverted to their status as loaned temporarily to be returned to Mr. Clarke at any time on his request.

Following again the analogy of domicile, there are, of course, hundreds of Americans who have preserved their domicile in the United States and in specific States, in spite of the fact that they have continuously lived abroad or in other States.* There are hundreds more who have saved their board bills during trips abroad without thereby losing their status as citizens,

* See *Ennis* v. *Smith*, 55 U. S. 400, 423; *Desmare* v. *U. S.*, 93 U. S. 605, 610; *U. S.* v. *Knight*, 291 F. 129, 133; *Dupuy* v. *Wurtz*, 53 N. Y. 556; *Barclay's Estate*, 259 Pa. 401; *Farmers Loan & Tr. Co.* v. *U. S.*, 60 F. (2) 618; *Union Tr. Co.* v. *Com'r.*, 5 B. T. A. 1272; *Guaranty Tr. Co.* v. *Com'r.*, 25 B. T. A. 507; *Rogers* v *Com'r.*, 17 B. T. A. 570.

and still other hundreds who have preserved their domiciles in their native States in spite of futile attempts to secure permanent business positions elsewhere. The question is not how long any of these people remained away from home, but whether they ever indicated an intention to abandon their original domicile and to remain permanently away from it. Where an adequate reason for their temporary sojourn away from home appears, there is no question of their having lost their original domicile.

In the case at bar, the pictures had admittedly an original situs in New York. They were sent to Philadelphia by the owner in March 1928 for the temporary purpose of exhibiting them at the opening of the new Museum. The period of two years and ten months during which the pictures remained at the Museum must not be regarded in gross, (as apparently the majority of the lower Court treated it) but as a series of shorter intervals at the end of each of which the loan was renewed on the express solicitation of Dr. Kimball. The Bill expressly avers (Rec. 5), and the Answer admits (Rec. 37), that "*on several occasions* subsequent to the date of the original loan" in March 1928, Clarke suggested the return of the paintings, but under pressure from Dr. Kimball to extend his loan, because of the great appreciation shown by the public, Clarke orally "consented *from time to time* to leave the paintings temporarily at the Museum" and thus, when Clarke died on January 18, 1931, they were there

on display, returnable on demand. Up to the time of Mr. Clarke's death, there is not the slightest indication of any thought on his part that they should be left permanently in Philadelphia. Indeed, if, prior to his death, Mr. Clarke had donated them to the Museum, or if by his Will he had so given them, they would be expressly exempt from inheritance tax in Pennsylvania (see Act of July 9, 1919, P. L. 794, 72 P. S. §2483).

It is with bad grace that Pennsylvania, having, for the pleasure and education of the citizens of Pennsylvania, induced Mr. Clarke, a gentleman of advanced years, to lend these pictures to the Museum, and having successfully staved off his repeated requests for their return, by successively persuading him to renew the loan, now seeks to exact this tax from his estate, merely because he happened to die before he succeeded in getting his pictures back to New York.

CONCLUSION.

It is respectfully submitted that the decree of the Court below should be reversed with directions that the injunction be granted as prayed.

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